Filed 12/28/09 In re Jordan J. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JORDAN J., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. C. M., Defendant and Appellant.	G042187 (Super. Ct. No. DP013788) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed and remanded with directions.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Plaintiff and Respondent.

* * *

C. J. (mother) appeals from the court's order granting the application of Orange County Social Services Agency (SSA) to use media to find an adoptive home for Jordan J. (now 11 years old). In addition, mother contends, and SSA agrees, that SSA failed to provide proper notice under the Indian Child Welfare Act (25 U.S.C. § 1900 et seq., (ICWA)). We affirm the court's order permitting SSA to use media to locate an adoptive family for Jordan. We must, however, remand the case to the juvenile court for compliance with the ICWA.

FACTS

In late 2006, the court found that seven-year-old Jordan and her half-brother, Victor, came within Welfare and Institutions Code section 300, subdivision (b)[1] (failure to protect), and declared them dependent children. Jordan was placed in a short-term group home, then moved to a different group home in February 2007.

At the 18-month review hearing in February 2008 for Jordan only (not Victor), the court ordered that mother's reunification services be terminated and scheduled a section 366.26 selection and implementation hearing (the .26 hearing) for June 2008.

In its June 2008 report for the .26 hearing, SSA reported Jordan wished to live with Victor and Victor's father, Mark M. (Jordan's stepfather). At that time, SSA's

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

"Case Plan Goal" for Jordan was "Long Term Foster Care with Non-Relative." The court found, pursuant to section 366.26, subdivisions (c)(1)(B)(iv) and (c)(4)(A), that Jordan was not adoptable and that adoption and termination of parental rights were not in her best interests and ordered that she "remain in long-term foster care."

Jordan has lived in the same group home continuously since February 2007. A December 2008 permanent placement assessment (PPA) for Jordan stated: "'The child is not adoptable based on her behavioral problems, her significant birth family relationships, and her desire to be placed with family. Thus the child is not appropriate for a traditional adoption at this time.' . . . 'Should the child demonstrate stabilized behaviors for a significant period of at least 6 months, and the child decides she wants to be adopted, a new PPA should be submitted to reassess adoptability.'"

By the time of a periodic review hearing on March 30, 2009, the situation had changed somewhat. SSA reported Jordan was now "anxious to be adopted" and "just want[ed] to have a family." A new PPA stated: "[I]t is probable that the child will be adopted, but the child is difficult to place for adoption, and there is no identified adoptive family because: the child is seven years or older and/or the child has a diagnosed medical, physical or mental handicap." Jordan's diagnosed handicap was Attention Deficit Hyperactivity Disorder and depression. SSA's stated case plan goal for her continued to be "Long Term Foster Care with Non-Relative." The court ordered as Jordan's permanent plan the "plan of placement with a less restrictive foster setting," and set the next regular periodic review hearing six months later, on September 28, 2009. But in accordance with the changed assessment of the probability of adoption, and pursuant to a signed stipulation, the court also scheduled an April 27, 2009 special interim progress review hearing on finding Jordan an adoptive home.

SSA set about almost immediately to prepare for the April review hearing by, inter alia, preparing an ex parte application for court approval to use media "in an effort to locate an appropriate adoptive family for" Jordan. Specifically, SSA requested

permission to include Jordan in the efforts of the Orange County Heart Gallery, a volunteer organization, to recruit adoptive families for "difficult to place" children. As part of the Heart Gallery's recruitment efforts, a professional portrait of Jordan would be displayed "in art galleries, libraries, . . . other public places," and "on the Heart Gallery's Web Site." Although SSA's application by its terms was not limited solely to the use of media by the Heart Gallery, SSA's request described the Heart Gallery at length and did not specifically identify any other anticipated use of media to find Jordan an adoptive home. Although the social workers signed the application on April 9, 2009, it was not granted by the court until April 28, 2009, over mother's objection.

DISCUSSION

The Court Did Not Abuse Its Discretion by Permitting SSA to Use Media to Find Jordan an Adoptive Home

Both Mother and SSA focus their arguments on their divergent interpretations of Family Code section 8707, subdivision (d) (Family Code section 8707(d)), and whether the court erred under that statute by granting SSA's request to use media to locate Jordan an adoptive family. Family Code section 8707(d) requires the State Department of Social Services to establish a statewide "photo-listing service" and governs the conditions under which such photo-listing must or may be used to recruit adoptive families. (Fam. Code, § 8518 [definition of "Department"].) The statute does not govern the use of private media services in that effort. As described above, SSA's application to use media did not expressly seek permission to place Jordan on the statewide photo-listing service under Family Code section 8707(d). Nevertheless, the order authorizing "the Social Services Agency to utilize media in providing general descriptive, non-identifying information about the child in an effort to locate an appropriate adoptive family for the child" is broad enough to allow photo-listing under

Family Code section 8707(d). Thus, we review the order under the assumption it would be used both under Family Code section 8707(d) and with a private media service.

1. Photo-listing under Family Code Section 8707(d)

Mother contends that under Family Code section 8707(d), the court erred by granting SSA's request to photo-list Jordan "because adoption has never been identified as Jordan's permanent plan and therefore the use of media to locate an adoptive family is not authorized." Mother argues that Family Code section 8707(d) permits photo-listing of only those children who have been legally freed for adoption or for whom the *court* has identified adoption as the permanent plan. SSA disagrees, contending Family Code section 8707(d) also permits photo-listing of a child for whom SSA has identified adoption as "the *case plan*," regardless of whether a court has selected adoption as the *permanent plan*.

Where the relevant facts are undisputed, the interpretation and application of a statute presents a question of law subject to de novo review. (*International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611; *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) In independently construing a statute, we strive to ascertain the lawmakers' intent "so as to effectuate the purpose of the statute." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) "We look first to the 'plain meaning'of the statute's words, and only if the language is ambiguous do we resort to extrinsic aids . . . ." (*Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988.) Our role is "not to insert what has been omitted, or to omit what has been inserted." (Code Civ. Proc., § 1858.)

With these precepts in mind, we recite the language of Family Code section 8707(d): "All children legally freed for adoption whose case plan goal is adoption shall be photo-listed . . . . When adoption has become the case plan goal for a particular child, the licensed adoption agency may photo-list that child before the child becomes legally

freed for adoption." Thus, Family Code section 8707(d) expressly authorizes photo-listing of children who have been legally freed for adoption or who have not been legally freed for adoption but whose case plan goal is adoption.

SSA argues, inter alia, that because Family Code section 8707(d) "does not specifically exclude children in Jordan's position" — i.e., "children who are not yet freed for adoption, and for whom adoption is not yet identified as the case plan goal, and [who] do not have identified adoptive parents, [and who] are not 12 years or older and unwilling to be adopted" — the statute should be interpreted as permitting photo-listing for Jordan in light of the overall statutory preference for adoption as a permanent plan. In other words, SSA contends that some children as to whom Family Code section 8707(d) is silent may nonetheless be photo-listed. But a court construing a statute must read the statutory provisions together, avoid an interpretation which would render terms surplusage, and give every word "some significance, leaving no part useless or devoid of meaning." (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54.) SSA's interpretation of Family Code section 8707(d) would render the subdivision meaningless since there would be no need for the Legislature to specify two groups of children who may be photo-listed if other children may be photo-listed as well.

We turn to the two groups of children for whom photo-listing is permitted: (1) children who have been legally freed for adoption; and (2) children who have not been legally freed for adoption but whose case plan goal is adoption. As to the first group, a child may be "freed for adoption by either relinquishment or termination of parental rights . . . ." (Fam. Code, § 8704, subd. (a).) Thus a court may free for adoption a dependent child under section 300 (Fam. Code, § 8714, subd. (a)) by terminating the parental rights of the child's parents. Clearly, then, a child may be photo-listed after termination of his or her parents' parental rights.

As to the second group, i.e., children whose parents' parental rights have not been terminated but whose case plan goal is adoption, the question arises: What constitutes a "case plan goal" within the meaning of Family Code section 8707(d)?

Mother contends the answer is found in section 366.26. At a section 366.26 hearing, if the court finds "that it is likely the child will be adopted," the court must, subject to certain exceptions, "terminate parental rights and order the child placed for adoption." (§ 366.26, subd. (c)(1); *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249.) But under section 366.26, subdivision (c)(3), if "the court finds that termination of parental rights would not be detrimental to the child . . . and that the child has a probability of adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child, . . . within a period not to exceed 180 days." (*Ibid*.) Section 366.26, subdivision (c)(3) further provides: "During the 180-day period, the public agency shall, to the extent possible, contact other private and public adoption agencies regarding the availability of the child for adoption. . . . At the expiration of this period, another hearing shall be held and the court shall proceed pursuant to paragraph (1) or (4) of subdivision (b) [(terminate parental rights and order child placed for adoption, or appoint a nonrelative legal guardian, respectively).]"

Mother contends that when parental rights have not been terminated, the phrase "case plan goal" of adoption in Family Code section 8707(d) refers to a "permanent placement goal" of adoption ordered by the court pursuant to section 366.26, subdivision (c)(3). Thus, in mother's view, the second group of children who may be photo-listed are those who are adoptable but difficult to place, for whom termination of parental rights would not be detrimental, and as to whom the court has ordered a permanent placement goal of adoption without terminating parental rights. Photo-listing

would be allowed for this group of children under section 366.26, subdivision (c)(3), for no more than 180 days.

SSA distinguishes a "case plan goal" as used in Family Code section 8707(d) from a court-ordered "permanent placement goal" under section 366.26, subdivision (c)(3). Under section 366.3, subdivision (d), a dependent child's status must generally be reviewed by the court at least every six months.[2] At these review hearings, the court must determine "[t]he continuing appropriateness and extent of compliance with the permanent plan for the child, including . . . efforts to identify a prospective adoptive parent . . . , including, but not limited to, child-specific recruitment efforts and listing on an adoption exchange." (§ 366.3, subdivision (e)(3).) In contrast, the "case plan" is developed and modified as necessary by "caseworkers" (§ 16501.1, subd. (d)(1)) under the standards set forth in section 16501.1. The case plan must be "updated, as the service needs of the child and family dictate. At a minimum, the case plan shall be updated . . . no less frequently than once every six months." (§ 16501.1, subd. (d).) "The case plan shall be included in the court report and shall be considered by the court at the initial hearing and each review hearing. Modification to the case plan made during the period between review hearings need not be approved by the court if the casework supervisor for that case determines that the modifications further the goals of the plan." (§ 16501.1, subd. (f)(13).)

SSA argues that because "Jordan's permanency planning assessment changed from unadoptable to adoptable but difficult to place, SSA properly refocused her case plan on efforts to find an adoptive family, and the court properly authorized the use of media." SSA relies, in part, on *Sheri T. v. Superior Court* (2008) 166 Cal.App.4th 334, 340-341, where the Court of Appeal stated: "[T]he statutory scheme provides that a

---

[2] Section 366.3, subdivision (d) permits the review to "be conducted by the court or an appropriate local agency." Here, the court has been conducting the six-month reviews of Jordan's status.

child in long-term foster care shall not slip into oblivion; her status shall be reviewed every six months to make sure efforts are *continuously* being made to find a more permanent placement." (Italics added.)

SSA has the better of the argument. It has the authority to modify the case plan goal as circumstances change, and, as modifications occur between review hearings, the court-approved case plan and the case plan as modified by SSA may diverge. The most recent "case plan goal" in the appellate record is found in the updated case plan presented to the court at the review hearing on March 30, 2009. That plan identified the "case plan goal" as "Long Term Foster Care with Non-Relative." But SSA's status review report prepared for that hearing reported a change in the permanency planning assessment for Jordan, stating "it is probable that the child will be adopted, but the child is difficult to place for adoption." The court approved the case plan set out in the March 30, 2009 report and incorporated the plan "into its order by reference," which necessarily included the finding that it was probable Jordan would be adopted. Almost immediately thereafter, SSA commenced efforts to photo-list Jordan in an effort to recruit an adoptive family. Thus, substantial evidence supports a finding that Jordan's case plan goal had changed as a result of the changed permanency planning assessment and that Jordan now met the criteria for photo-listing under Family Code section 8707(d) — a child whose parents' parental rights have not been terminated but whose case plan goal is adoption. The mere fact that a data field on the first page of the March 30, 2009 updated case plan continued to list "Long Term Foster Care with Non-Relative" as the "goal" cannot be viewed in isolation. It is clear that SSA and the court concurred in determining to move forward toward a goal of adoption. There was no abuse of discretion in doing so.[3]

[3] Assuming SSA's case plan goal for Jordan is still adoption, SSA should formally designate adoption as her case plan goal.

2. Photo-listing on Heart Gallery

We find nothing in the law, and counsel has not cited any provision of law, that prohibits SSA from using private media to recruit a prospective adoptive family. As noted, SSA has determined that Jordan may be adoptable but difficult to place. Adoption is the preferred permanent plan for dependents of the court. (*Sheri T. v. Superior Court*, *supra*, 166 Cal.App.4th 334, 341.) "A juvenile court has a continuing responsibility to account for the welfare of a dependent child under its jurisdiction, wherever placed, unless and until a permanent and stable home is established" (*In re Rosalinda C.* (1993) 16 Cal.App.4th 273, 279) and may exercise its discretion in furtherance of this goal (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1107). We find no abuse of discretion in the making of the instant order.

SSA Failed to Comply with the ICWA's Notice and Inquiry Requirements

As we shall explain, noncompliance with ICWA's requirements in this case requires that it be remanded to the trial court for proper inquiry and notice under the ICWA.[4]

California law imposes upon the court and county welfare department "an affirmative and continuing duty to inquire whether a child [who is the subject of a section 300 petition] is or may be an Indian child . . . if the child is at risk of entering foster care or is in foster care." (§ 224. 3, subd. (a).) A social worker who "knows or has reason to know that an Indian child is involved" must "make further inquiry regarding the possible Indian status of the child . . . as soon as practicable, by interviewing the parents . . . and extended family members, [and] contacting the Bureau of Indian Affairs and the State Department of Social Services . . . and contacting the tribes . . . ." (§ 224.3, subd. (c).)

[4] Mother does not seek the reversal of any court order on the basis of noncompliance with the ICWA.

Mother is correct that the notice here was incomplete, and SSA concedes this is so. At a July 2006 detention hearing, mother stated her father might have Creek ancestry and Jordan's father might have Indian heritage. The court ordered SSA to notify the Bureau of Indian Affairs and the Creek tribes and to contact Jordan's maternal grandfather, father, and father's mother, SSA interviewed Jordan's maternal grandfather, but failed to ask about his possible Indian heritage. Furthermore, SSA sent the ICWA notice to the Bureau of Indian Affairs, but not the Creek tribes. SSA misstated Jordan's last name in the notice and listed her maternal grandfather, maternal grandmother, and maternal great-grandmother as "Unknown," even though their names were known. Because of the deficiencies in the notice sent out by SSA, the case must be remanded to the court for proper compliance with the ICWA.

DISPOSITION

We affirm the court's order granting SSA's request to use media to locate an adoptive home for Jordan. As to the ICWA violation, we remand the matter to the juvenile court with the following instructions. If it has not done so already,[5] the court shall direct SSA to comply with the ICWA and sections 224.2 and 224.3 in providing proper notice to the Bureau of Indian Affairs and any appropriate Indian tribes. The court shall schedule a hearing for a date complying with section 224.3, subdivision (e)(3), to determine whether the ICWA applies. At the hearing, if any noticed tribe has determined that Jordan is an Indian child within the meaning of the ICWA, "the juvenile court shall conduct further proceedings applying the appropriate provisions of the ICWA, the Welfare and Institutions Code, and the California Rules of Court." (*In re Justin S.* (2007) 150 Cal.App.4th 1426, 1438.)

IKOLA, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.

[5] SSA's brief states that it had already begun the process of properly complying with the ICWA.